No. 82-1554

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CHARLES E. STRICKLAND, Superintendent,
Florida State Prisons, et al.

Petitioner,

—v.—

DAVID LEROY WASHINGTON,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FORMER FIFTH CIRCUIT (UNIT B)

BRIEF OF THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION AND THE AMERICAN CIVIL LIBERTIES UNION, AS AMICI CURIAE SUPPORTING RESPONDENT

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Issue Presented

Amici will address the following issue:

WHERE DEFENSE COUNSEL, IN A CAPITAL MURDER PROSECUTION, FAILS TO INVESTIGATE OR PRESENT FAVORABLE EVIDENCE IN MITIGATION AT DEFENDANT'S SENTENCING HEARING, AND THUS RENDERS INEFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AMENDMENT, MUST THE DEATH SENTENCES BE VACATED BECAUSE THE PROSECUTION CANNOT DEMONSTRATE THAT COUNSEL'S FAILURES WERE HARMLESS BEYOND A REASONABLE DOUBT?

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Interest of Amici

The National Legal Aid and Defender Association (NLADA) is the sole national voice for the overwhelming majority of public defenders, private attorneys and defender clients who make up its defender membership. Representing nearly 600 member public defender offices and about 7,000 individual defenders, NLADA has spoken out on national issues of concern to the legally indigent and their

attorneys in both civil and criminal courts since 1911.

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization of over 250,000 members, founded in 1920, dedicated to preserving and defending fundamental liberties embodied in the Constitution. The ACLU has frequently appeared in this Court to defend the Sixth Amendment's right to counsel, which is indispensable to preservation of other due process rights.

Amici are vitally interested in the principles laid down in this case regarding the duties of counsel, under the Sixth Amendment, and the impact of counsel's ineffective assistance on the fundamental fairness of proceedings, under the Fourteenth Amendment. Our vital interest in the rules to be applied for claims of

ineffective assistance of counsel lead to our involvement in this case.

Amici have obtained and lodged with the Court the written consent of the parties to file a brief in this case.

I

BECAUSE THE "REASONABLY EFFECTIVE COUNSEL" TEST IS NO LESS SUBJECTIVE THAN THE "FARCE AND MOCKERY" STANDARD, AND BECAUSE MOST OF COUNSEL'S ERRORS OCCUR IN THE INVESTIGATION OR PREPARATION STAGES OF TRIAL COURT HEARINGS, THIS COURT SHOULD ADOPT OBJECTIVE STANDARDS FOR COUNSEL'S PERFORMANCE OF DUTIES AT THE PREPARATION STAGE.

Separate tests for the effectiveness of counsel are appropriate under the Fifth and Fourteenth Amendment "due process" clauses and the Sixth Amendment's "assistance of counsel" provision. Under this two-pronged test, the defendant is deprived of the effective assistance of counsel when counsel either is unfairly impaired by external or systemic restraints, or fails to exercise "the skill, judgment and diligence of a reasonably competent defense counsel." United States v. Cronic, 675 F.2d 1126,

1128 (10th Cir. 1982)[1] Mr. Washington asserted in the District Court that his attorney "committed several discrete errors of omission and commission that reasonably effective counsel would not have committed." Pet. App. A.61, See also, Washington v. Strickland, 673 F.2d 879, 885 (5th Cir. 1982). Three death sentences were imposed by the trial court.

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[1] This argument for a "duel" approach to ineffectiveness of counsel is fully developed by Amici in another case now pending in this Court, United States v. Cronic, No. 82-660, cert. granted Feb. 22, 1983. Amici in this case do not include the Association of Trial Lawyers of America (ATLA), and the views expressed herein are not endorsed by ATLA.

Amici accept the alternative articulation of the "reasonably competent defense counsel" standard in the opinion of the Court of Appeals below: "Counsel reasonably likely to render and rendering reasonably effective assistance given the totality of the circumstances." Pet. App. A 19-20.

No assertion is made regarding unfair impediments or external restraints. Accepting that analysis of counsel's conduct must be conducted under some form of the "reasonably competent counsel" test, this Court must find that Mr. Washington's counsel failed to render reasonably effective assistance of counsel, by virtue of his failure to investigate any potential mitigating evidence prior to defendant's sentencing for capital murder, and by his failure to request or present certain favorable evidence at the sentencing hearing.

Any articulation of the "reasonably competent counsel" test is necessarily subjective, and more objective guidelines or criteria should be applied by this Court to determine whether the error

rises to constitutional magnitude.[2] United States v. Cronic, No. 82-660, Brief of Amici, at 41 et seq. This is particularly true in the case at bar, where the failures of counsel were literally a matter of life and death for the defendant.

A clear and coherent set of guidelines for all cases can be found in Colorado Supreme Court Justice William H. Erickson's articulation of the basic duties of counsel:

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[2] The Government's brief, in both Cronic and here as Amicus, argues for a requirement of proof of "serious derelictions" by counsel to establish a denial of effective assistance of counsel. Brief for the United States as Amicus Curiae, at 26-30. This test is no less subjective than any manifestation of the "reasonably competent counsel" test, and the need for objective criteria arises even if the Government's test is adopted.

1. Counsel must diligently and actively participate in the full and effective preparation of his client's case.

2. Counsel has a duty to investigate clearly all defenses of fact and of law that may be available to the defendant.

3. Counsel must confer with his client without undue delay and as often as necessary to elicit matters pertinent to his defense.

4. Counsel should promptly advise his client of his rights and take all actions necessary to preserve them.

5. Counsel should be concerned with the accused's right to be released from custody pending trial, and be prepared, when appropriate, to make motions for a pre-trial psychiatric examination or the suppression of evidence.

Erickson, "Standards of Competency for Defense Counsel in a Criminal Case" 17 Am. Crim. L. Rev. 233, 245 (1979).

A very recent article by Professor Gary Goodpaster develops a more specific set of guidelines and standards for defense counsel in the trial of a capital case. Extrapolating from the various holdings of this Court, Professor Goodpaster concludes his analysis by setting out several necessary rules of conduct for defense counsel:

> A capital defendant's trial counsel must:
>
> 1. conduct thorough crime and life-history investigations in preparation for both the guilt and penalty phase of the trial;
>
> 2. fully inform the client of all available defenses and the potential penalty phase consequences of each defense, and obtain the client's assent to both the guilt and the penalty case to be presented;

3. attempt to rehabilitate members of the venire who seem to be unequivocally opposed to imposition of the death penalty;

4. integrate the guilt phase defense theory and strategy with the projected affirmative case for life at the penalty phase;

5. at the penalty phase of the trial, present all reasonably available mitigating evidence helpful to the defendant.

Goodpaster, "The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases" 58 N.Y.U. L. Rev. 299, 362 (1983) (Emphasis added).

Both the general guidelines, as well as specific, capital-case focused criteria for counsel's performance, are consistent with the holdings of this Court and with well-recognized and even more detailed development of defense counsel's duties.

See ABA Standards for Criminal Justice, The Defense Function (1981).

Amici do not suggest that detailed standards be developed by the Court, or that already adopted standards be incorporated in toto into the case law. However, the failure to more fully develop a definitional context for "reasonably effective representation" has provided little guidance to lawyers and trial judges, and will encourage further appellate litigation to give contextual meaning to the test.

There is empirical support for the notion that the "reasonably effective counsel" standard is as subjective and vague as the almost universally rejected "farce and mockery" standard used by federal and state courts prior to this Court's decision in McMann v.

Richardson, 397 U.S. 759 (1970), where the Court first made reference to attorney performance within the "range of competence of attorneys in criminal cases," Id. at 770-71.

In anticipation of the issues presented by this case, the National Legal Aid and Defender Association conducted extensive research into the nature and extent of claims of ineffectiveness of counsel in state and federal courts between 1970 and July of 1983.[3] That research demonstrates that the claim of ineffectiveness of counsel is no more frequently successful under the "reasonably effective counsel" test than

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[3] The research is extensively described in the Brief of Amici, pp. 19-25 and Appendix A, United States v. Cronic, No. 82-660.

under the "farce and mockery" standard. One would assume that if the former test were more stringent than the latter, the progressive adoption of the "reasonably effective counsel" test by state and federal reviewing courts over the past decade would result in greater frequency of relief granted. The study shows no significantly higher incidence of relief, either overall or by trend.[4]

The greatest shortcomings of counsel occur in failure to adequately investigate and prepare the case for trial or other disposition. Our examination of cases with relief granted shows the

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[4] The incidence of relief in death penalty appeals is so tiny as to suggest that reviewing courts will not seriously consider the issue in review of these cases. Even conceding the invalidity of the penalty for part of the decade of the 1970's, our sample showed only 5 reversals of capital cases of about 4,000 cases examined.

following data regarding the point at which counsel's error (or errors) occurred:

Figure 1

Point in Proceedings of Counsel's Error Resulting in Relief on Grounds of Ineffectiveness of Counsel

Point in Proceedings		No. of Cases
Pretrial Stage		69
Investigation	22	
Preparation for trial	21	
Motion Practice	19	
Late Appointment	7	
Guilty Plea		12
Trial		45
Post-Trial/Sentencing		6
Appeal*		20
Lawyer's Legal or Ethical Misconduct		8
"General" or Other Grounds**		12
TOTAL		172***

* Including failure to properly perfect appeal.

** Includes unspecified or comprehensive action or inaction.

*** Exceeds total cases due to inclusion of some cases in more than one category, as appropriate.

Errors in failure to investigate, failure to adequately prepare and failure to file appropriate motions account for 62 instances, or 36%, of the errors resulting in a grant of relief to defendants represented ineffectively.[5] This area, when combined with trial errors,

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[5] The data in our sample are not inconsistent with the only other empirical study of claims of ineffectiveness discovered in this research. Strazzella, "Ineffective Assistance of Counsel Claims: New Uses, New Problems," 19 Ariz. L. Rev. 443, 445 n.8 (1977). Professor Strazzella studied claims made in reported opinions in the federal Courts of Appeal between May, 1963 and May, 1965 and between November, 1969 and November, 1971.

Strazzella's data show an incidence of 282 claims in the second period, an average of 161 per year. Our study showed 1,996 claims in the thirteen and one-half years between 1970 and July, 1983, an average of 148 per year, a slight decline.

Moreover, Strazzella's data show a total of 64% of the claims made in the latter period attacked counsel's performance in "pretrial preparation," "pretrial practice" or "trial."

which are often the result of inadequate preparation, constitutes the overwhelming majority of counsel's errors.

The areas of investigation and preparation cry out for clear and articulate judicial standards of review. These are practice issues, and law school curricula are notoriously weak in training for trial practice, despite the advances in clinical education. Moreover, because of heavy caseloads and statutory limitations on support resources available, public defenders and appointed counsel in state courts, such as counsel in the case at bar, are frequently encouraged, either explicitly or implicitly, to forgo one of the most basic of the attorney's duties - the duty to adequately prepare.

The adoption of clear and objective standards with regard to counsel's duty

to investigate and present favorable evidence would obviate the need for inquiry into the nature or extent of prejudice suffered by the defendant. Most relief comes about because of counsel's failure to prepare, an error of omission. Judging from the relief granted in NLADA's study, it is fair to say that courts are reluctant to speculate as to the negative impact of a failure to perform an essential duty. It is simply impossible to judge, in hindsight, what counsel's complete investigation and presentation would reveal. Without having performed these essential tasks, it is impossible for the reviewing court to fairly conclude that the defendant had his day in court. The adoption of objective standards for preparation would give guidance to counsel and courts, and eliminate the confusion

generated by inquiry into prejudice under current standards.

The "reasonably effective assistance" standard, without more, confuses the issue of the existence of a constitutional error and entirely separate issue of the harm occassioned by that error. Where any variant of the "reasonable competency" standard is utilized, both common sense and case law dictate that harm will not be disregarded in the determination of whether constitutional error has occurred at all. Any harmless mistake is more likely to be found "reasonable" than a mistake which hurts the defendant's case. Lasater, "The Role of Harm in Ineffective Assistance of Counsel Cases: Practice and Policy." 32 Syracuse L. Rev. 759, 785-86 (1981); See Cooper v. Fitzharris, 557 F.2d 1162, 1167 (9th Cir.

1977) (Duniway, J., concurring), rev'd en banc, 586 F.2d 1325 (9th Cir. 1978), cert. denied, 440 U.S. 974 (1979).

No standard for ineffectiveness, subjective or objective, will result in less claims of ineffectiveness. So long as the right exists, it may be expected that defendants will avail themselves of the right to raise the issue, where appropriate. The adoption of clear and specific standards, however, would result in economy of resources of both lawyers and judges at the trial and appellate levels. The more specific standard would give concrete guidance to the trial attorney and the trial judge - a "measuring stick" against which the attorney's conduct could be quantified and measured - and result in less litigation and fewer appeals, particularly on that issue.

The adoption of clear standards to govern counsel's performance in preparation and presentation of criminal cases would provide clear guidance to courts and counsel. Judged against any of the standards described herein, it is clear that counsel's performance here fell below the constitutionally mandated requirement that he be effective. The case must be reversed for a new trial, unless the prosecution can show counsel's errors were harmless.

In the alternative, the case must be remanded to the District Court for additional findings consistent with the criteria developed by the Court of Appeals.

II

IF THE COURT DETERMINES THAT DEFENSE COUNSEL ERRED IN REPRESENTING THE DEFENDANT, REVERSAL OF THE CONVICTION OR SENTENCE FOLLOWS IF COUNSEL'S FAULTY PERFORMANCE HARMED THE DEFENDANT'S CASE. HERE, THE FAILURE OF DEFENSE COUNSEL TO PREPARE OR PRESENT EVIDENCE IN MITIGATION OF A CAPITAL MURDER IS PRESUMPTIVELY PREJUDICIAL.

As demonstrated above, by adopting a general and subjective test of "reasonably effective counsel," this Court will have implicitly imported an element of prejudice into the test itself, since an unreasonable action of ineffective counsel will almost always harm the defendant's case. In fact, to require the defendant to demonstrate both an error of constitutional dimension and serious harm or prejudice which might have altered the outcome of the case in

his favor not only unfairly shifts the burden of proof to the defendant (see III, infra), but alters the essential nature of the test for ineffectiveness.

As to the latter, the temptation is always there to look to the strength of the state's case in making judgments about the defense attorney's ation. In context, it may always be possible to fashion some justification for failure to perform competently when the defendant appears factually guilty. Thus, without some articulated minimum standards, a requirement that prejudice be demonstrated is not only duplicative, but strongly implies that defense counsel owes his best effort only to the defendant with a hopeful case. This would fly in the face of the most fundamental of counsel's duties - to represent a client "zealously within

the bounds of the law." ABA Code of Professional Responsibility, Canon 7 (1969). If the defendant must be required to prove his innocence - that is, that a conviction would not have been obtained - there is a serious question as to why the government need provide a competent attorney to represent defendants with weak cases. In fact, a diligent attorney may be able to overcome the most difficult case against his client, an outcome which can never be predicted in reviewing the apparently strong factual case on appeal. See Note, "Identifying and Remedying Ineffective Assistance of Criminal Defense Counsel: A New Look After United States v. Decoster," 93 Harv. L. Rev. 752, 768-69 (1980).

Moreover, the teaching of Chapman v. California, 386 U.S. 18 (1967) requires

no more than that the defendant establish a denial of a "substantial" constitutional right - here, the right to effective assistance of counsel - to shift the burden to government to show that the violation was harmless beyond a reasonable doubt, a heavy burden indeed. Id. at 23, n.8 and 24. It cannot be gainsaid that the right to effective counsel is no less substantial than the right to counsel itself. The need for the "guiding hand" of competent counsel is the lynchpin of all other procedural rights. If this is true, Chapman would require that the defendant's conviction be reversed once an error of constitutional dimension has been established. This test, followed in the Fourth Circuit for fifteen years, is appropriate and should be adopted by this Court. Coles v. Peyton, 389 F.2d 224,

226 (4th Cir. 1968), cert. denied, 393 U.S. 849 (1968).[6]

Professor Goodpaster suggests that the failure to conduct a reasonable mitigating case investigation in a capital case, or failure to represent reasonably available mitigating evidence, creates a presumption of prejudice:

> Counsel will have made many guilt and penalty phase decisions without the benefit of possibly vital information. All of these decisions will have been pervasively, but indeterminably, influenced by having been made without relevant information. Any attempt to assess the effect this lack of information may have had on counsel's decisions would be

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[6] It is also noteworthy that the Fourth Circuit has adopted specific criteria for counsel's performance, including prompt appointment of counsel, adequate opportunity to prepare a defense, adequate consultation, and appropriate investigation and preparation. Id at 226.

> pure speculation. Such an assessment would be pure fantasy when applied to the sentencer's decision. The sentencer's ultimate decision is based on innumerable constituent decisions regarding the weight and credibility of witnesses and evidence as well as on many intangible emotional, moral, and psychological factors. Defense counsel's decisions regarding defenses, trial strategy and tactics, and examination and cross-examination of witnesses only partly determine the sentencer's constituent decisions. The ultimate effect on the sentencer's final decision is absolutely indeterminate and indeterminable.
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> Goodpaster, supra, 58 N.Y.U. L. Rev. at 350-51.

When counsel fails to discover and present merely cumulative mitigating evidence, or when such evidence is omitted by virtue of a tactical choice, the inherent prejudice may be overcome, according to Professor Goodpaster. Id., at 351. These

two areas were exactly within the perimeters of the remand by the en banc court in the Court of Appeals. Pet. App. at 55. These issues would be settled by the action taken by the Court of Appeals, and this Court should affirm the judgment below.

III

THE PROSECUTION MUST BEAR THE BURDEN OF PROOF OF DEMONSTRATING ABSENCE OF HARM, BEYOND A REASONABLE DOUBT, ONCE AN ERROR OF CONSTITUTIONAL DIMENSION HAS BEEN ESTABLISHED.

The Court of Appeals refused to put the burden of proof for prejudice on the government under the Chapman test, reasoning that the error was not "caused" by the state, and that the defendant has more access to the questioned evidence than the state. Pet. App. at 66-70.

These conclusions are unwarranted and illogical. Whether counsel's errors

did or did not result from action by the state is irrelevant; the issue is not whether the government or the defendant were responsible for counsel's actions, but whether the defendant's Sixth Amendment right to effective counsel was violated. Counsel's actions cannot be imputed to the defendant, who asserted the right to counsel because he knew that he was not trained to defend himself, or to make judgments overseeing his counsel's performance. If he were, it could be argued in every case that the defendant "waived" his right to effective counsel by not properly supervising his attorney.

This is no less true in the context of review by federal habeas corpus of state court convictions, where this Court has held that defense counsel has broad

power to forfeit basic rights of the client. Wainwright v. Sykes, 433 U.S. 72 (1977); Engle v. Isaac, 456 U.S. 107 (1982). These cases inpute the lawyer's errors to the defendant because there is an assumption that counsel was acting competently and zealously, well within reasonable boundaries, and that the defendant had his day in court.[7] When counsel's own effectiveness is challenged, the essential fairness of the adversary process is impugned, and deference can no longer be paid to the

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[7] In fact, a strong implication is raised in both Wainwright and Engle that presumably competent counsel may have attempted to make a shrewd tactical decision in failing to contemporaneously object, thereby waiving the claim in state court while preserving it for federal court action. Wainwright v. Sykes, supra, 433 U.S. at 89-90; Engle v. Isaac, supra, 456 U.S. at 129, n.34.

sanctity of state court proceedings, as was the basis for Wainwright and Engle.

Finally, the absurdity of imputing appointed counsel's errors to a defendant who had no choice in selection of that lawyer is painfully transparent. Such allocation of power is appropriate only if it is assumed that counsel possesses all the requisite characteristics of a "reasonably effective" advocate.

The Court below also asserted that the defendant has greater access to the evidence of prejudice, and so is in a better position to prove prejudice than the state. Pet. App. at 69. This assertion, too, seems almost ludicrous in the face of the fact that the defendant, incarcerated and incapacitated before sentencing, made the questioned evidence

known to his appointed attorney well in advance of sentencing. The issue is not the defendant's access to evidence, but his attorney's failure to act on knowledge of that evidence.[8]

By putting the burden of proof on the defendant to show the evidence would have made a difference (in outcome or otherwise) the Court of Appeals assumes the defendant's guilt until he has proven otherwise. It further assumes the defendant has had a "day in court" and that the

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[8] If burdens are to be allocated based on accessibility to evidence, it may be noted that the government has far greater physical and financial resources to conduct an investigation than any defendant with appointed counsel. In Florida, for example, "reasonable" expenses for investigation are subject to judicial approval. Trial judges are notoriously parcimonious in such awards. See, Fla. Stat. Ann., Sec. 925.035(1) (Supp. 1980).

day was a meaningful one, which is the very question in issue. To presume lack of prejudice would question the underpinnings of the adversary system, the same underpinnings which gave meaning to the establishment of the right to effective assistance of counsel in Powell v. Alabama, 287 U.S. 45 (1938) and Gideon v. Wainwright, 372 U.S. 335 (1963).

IV

IMPOSITION OF AN OUTCOME DETERMINATIVE TEST FOR PREJUDICE IS UNCONSCIONABLE AND IMPOSSIBLE TO APPLY IN MANY STATE COURT CONTEXTS.

Only the D.C. Circuit has adopted the "outcome determinative" test suggested by the Solicitor in both this case and United States v. Cronic. Brief for the United States as Amicus, at 18 et seq. See United States v. Decoster, 624

F.2d 196 (D.C. Cir. 1979), cert. denied, 444 U.S. 944 (1979). Amici urge rejection of this test because it asks reviewing courts to play an inappropriate role as finders of fact, and because the test would be impossible to apply in many state court proceedings, particularly where appointed counsel's behavior may be so abysmal that the record will afford no basis for applying the test.

One of the most salient reasons for not applying this draconian test for prejudice is found in the panel decision in the Court of Appeals, where the court stated:

> To require a petitioner to establish a likelihood that the outcome of criminal proceedings would have been altered in his favor had the error not occurred would require that the court. . . put itself in the place of the trial court factfinder in

> an attempt to predict with some considerable degree of accuracy what that factfinder would have done had it been presented with different evidence. We think that a framework for analysis which would inevitably require us. . . to engage in such highly speculative re-creations and revisions of trial court proceedings is to be avoided rather than embraced.
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> Washington v. Strickland, 673 F.2d 879, 901 (5th Cir. 1982)

More importantly, application of this test would jeopardize the unquestionably correct outcome of even those few state court convictions (about 4%, according to our study) which are overturned on appeal due to egregious errors by counsel.[9] The examples are many, and include the following:

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[9] Obviously, these examples include only reported appellate cases. Many cases undoubtedly go unreported to protect counsel's reputation, or are resolved by appropriate relief in the trial court.

1. Where one deputy public defender had handled the defendant's first degree burglary case for about three months before trial, the trial court forced a new deputy public defender to take the case to trial despite counsel's assertions that he had not prepared or investigated the case. Although the court found prejudice, it did not find the outcome would be different with original counsel. The conviction was reversed and remanded for a new trial. State v. Jackson, 23 Ariz. App. 473, 534 P.2d 281 (1975).

2. The defendant was convicted of armed robbery and sentenced to 20 years imprisonment. At his prelimary hearing, the defendant had been represented by a person posing as an attorney, but not admitted to practice in Tennessee. The re-

viewing court reversed for a hearing in the trial court to determine whether the denial of counsel at preliminary hearing was harmless under Chapman v. California, while noting that "the record permits no reasonable doubt" of the defendant's guilt. McKeldin v. State, 516 S.W.2d 82, 87 (Tenn. 1974).

3. Defendant was charged with robbery, assault and battery and other offenses. Where the primary issue was identification, appointed counsel failed to investigate or present an alibi defense known to him at least eight months in advance of trial. The reviewing court applied a harmless error test for prejudice and concluded that remand for a new trial was required. Had an outcome determinative test been applied, the court may have reached a different result, since it

noted that the jury may have disbelieved the alibi, which was offered by the defendant's girlfried, "an interested witness." Commonwealth v. Washington, 239 Pa. Super. 336, 346 (1976).

4. Appointed counsel for a defendant charged with malicious assault at least twice failed to make a motion for mistrial based on improper mention to the jury by the prosecutor of defendant's prior convictions. The trial court noted during trial that mistrial was "saved" only by defense counsel's inaction. At a post-trial hearing, counsel asserted that the action was due to his desire not to have to try the case "a third time" due to the economic impact on his practice. The reviewing court noted that the defendant was "victimized by an unsatisfactory system of providing counsel for indigents."

No mention was made as to the nature of the state's evidence. State v. Pelfry, 256 S.E.2d 438, 441 (W.Va. 1979)

5. Four months before defendant's trial for murder, defense counsel requested and received investigative assistance. No written or oral report was prepared by the investigator, and counsel went to trial admitting he had not spoken to any witnesses or conducted any factual investigation. The trial court denied a motion for delay, noting that "this was not a capital case." The reviewing court reversed and remanded, but did not suggest the outcome may have been different, had counsel or his investigator performed their jobs. Flores v. States, 576 S.W.2d 632 (Tex. 1978)

These reported examples demonstrate that the outcome determinative test for

prejudice is not only unduly harsh, but could result in serious miscarriages of justice, if carried to its logical and absurd extreme. The test proposed by Amici is simple, fair and workable and should be adopted by this Court.

CONCLUSION

Appointed counsel failed to perform essential investigatory and preparatory tasks in advance of defendant's capital murder sentencing, and further failed to present viable evidence in mitigation at the penalty hearing. Because these errors amount to deprivation of the defendant's Sixth Amendment right to effective representative by counsel, and because the prosecution cannot demonstrate that these omissions were harmless beyond a reasonable doubt, this matter must be remanded for a new sentencing hearing in state court, or in the alternative, to the District Court for further findings consistent with the holding of the en banc Court of Appeals.

Respectfully Submitted,

Richard J. Wilson, Esq.